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INTERSTATE CLAIMS: THEIR HISTORY AND THEIR CHALLENGES

Mark D. Esterle*

This Article provides an overview of the cases and statutes relating to interstate claims for unemployment compensation. The author suggests that the current federal statutes and regulations are inadequate on the grounds that they are ambiguous, lead to inconsistent results in different states, and may fail to ensure due process in claims determinations. The author highlights these problems with regard to interstate fact finders, attorney representation, witness subpoenas, and access to judicial review. Finally, he points to regulations that cover interstate unemployment compensation claims by federal employees and military servicemembers as models for new regulations of uniform application.

INTRODUCTION

In an interstate claim for unemployment compensation benefits, the claimant has worked in one or more states and then files a claim for benefits in another state. The states may be adjacent or very distant. According to federal statistics, from January 1, 1993, through October 31, 1994, approximately 1.5 million interstate claims for unemployment compensation were filed.¹ This considerable number of interstate claims filings makes the issues that the unemployed and their advocates face significant. These issues include: Which state's law controls in determining the claimant's eligibility? How can a claimant obtain legal representation for a hearing conducted in the state where he was last employed? If the hearing is conducted by telephone, how can the claimant subpoena necessary witnesses who reside in another state? How does a claimant obtain judicial review? Is the claimant even entitled to unemployment benefits?

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1. See Statistics obtained from Cynthia L. Ambler, Unemployment Insurance Service, United States Department of Labor 1 (Nov. 23, 1994) [hereinafter Statistics of Cynthia L. Ambler] (on file with the *University of Michigan Journal of Law Reform*).

Because we live in a mobile economy in a federal system, the option of filing interstate claims is important. Although the United States Department of Labor (USDOL) monitors how quickly states process interstate claims, it has not established standards that measure the quality of interstate determinations.² This Article will provide a brief overview of federal law on unemployment compensation, exploring the legislative history of interstate claims law and implementing regulations, while focusing on Kentucky as a sample state to show how state law can complicate interstate claims. Case examples will demonstrate the need for reform in interstate claims processing in areas such as non-combined wage claims, attorney representation, witness subpoenas, and the right to judicial review. This Article advocates that the USDOL or Congress address these issues and weed out the unnecessary pitfalls in interstate claims litigation, using as guidance existing federal regulations for processing the interstate claims of former government and military employees.

I. OVERVIEW OF UNEMPLOYMENT COMPENSATION PROVISIONS

To illuminate the difficulties involved in filing an interstate claim, it is first necessary to discuss the history of unemployment compensation as well as the legislative history of interstate claims.³ The Social Security Act, containing requirements for federal-state unemployment compensation programs, was signed into law by President Franklin D. Roosevelt in 1935.⁴ The Act was meant to provide temporary relief to any recently unemployed worker, "at a time when otherwise he would have nothing to spend."⁵ Unemployment compensation was to assist the worker while he looked for "substantially equivalent employment."⁶ Congress also viewed unemployment insurance as

2. See UNEMPLOYMENT INS. SERV., U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE QUALITY APPRAISAL RESULTS FY 94, at 57-69 (1994).

3. The United States Supreme Court discussed the history of unemployment compensation law in *California Department of Human Resources Development v. Java*, 402 U.S. 121, 130-33 (1971).

4. Social Security Act, ch. 531, § 303, 49 Stat. 620, 626 (1935) (codified as amended at 42 U.S.C. § 503 (1994)); see *Java*, 402 U.S. at 130-31.

5. See *Java*, 402 U.S. at 131.

6. See *id.* at 132 (quoting statement of the Secretary of Labor).

a way to stabilize industry⁷ by providing unemployed workers with money to purchase necessary goods and services and thereby preventing the decline of other industries.⁸

Accordingly, the federal government provides funds for unemployment compensation programs that are administered by the states. All state unemployment compensation programs are financed in part by grants from the federal government under the Social Security Act.⁹ Under the Act, no grant may be made to a state for a fiscal year unless the Secretary of Labor certifies the amount to be paid,¹⁰ and the Secretary may not certify payment of federal funds unless the state's program conforms to federal requirements.¹¹

The Social Security Act contains numerous other requirements constraining the ability of the Secretary of Labor to grant payments to states under their unemployment compensation programs. For example, individuals whose claims for unemployment compensation have been denied must have an opportunity for a fair hearing.¹² In addition, the USDOL has promulgated regulations to assure that states comply with prompt payment of benefits.¹³

Congress has adopted other relevant unemployment compensation provisions since the Act was enacted. For example, states must now assure payment of unemployment compensation to federal civilian employees.¹⁴ Similar legislation protects honorably discharged armed forces personnel.¹⁵ In addition,

7. *See id.*

8. *See id.* at 132–33.

9. *See* 42 U.S.C. §§ 501–503 (1994).

10. *See id.* § 502(a).

11. *See id.* § 503(a). For example, state unemployment compensation laws must “insure full payment of unemployment compensation when due.” *Id.* § 503(a)(1). In *Java*, the Supreme Court found a violation of this requirement where the state of California stopped unemployment benefit payments if the claimant's employer filed an appeal. 402 U.S. at 128. Even if the claimant eventually prevailed, he would have subsisted for seven to ten weeks without benefits because of the referee's delay in reaching a decision. *Id.* at 128, 133–35. The Supreme Court held that California's delay in payment violated the Social Security Act because California's procedure frustrated “the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible.” *Id.* at 135.

12. 42 U.S.C. § 503(a)(3).

13. *E.g.*, 20 C.F.R. pts. 640, 650 (1995) (establishing standards for promptness in benefit payments and in appeals).

14. 5 U.S.C. § 8502 (1994).

15. *Id.* § 8521(b). Regulations pertaining to unemployment compensation programs for civil servants and ex-servicemembers may be found at 20 C.F.R. pts. 609, 614 (1995). These provisions specify which state's law will apply. *Id.* §§ 609.8, 614.8–9.

Congress has adopted the Federal Unemployment Tax Act (FUTA).¹⁶ The Social Security Act also requires the Secretary of Labor to ensure state compliance with the FUTA.¹⁷

A. FUTA and Interstate Claims

In 1970, the FUTA was amended to include a provision on interstate claimants and unemployment compensation.¹⁸ As the Act's legislative history shows, prior to 1970, agreements among the states to handle claims for unemployment compensation were voluntary.¹⁹ In most instances, the voluntary agreements worked fairly well.²⁰ However, if even a small number of states refused to honor other states' agreements on unemployment benefits, the result was inequitable.²¹ For example, some states penalized workers merely because they had worked and become unemployed in another state; not only was this inequitable, but such a provision had the potential to inhibit worker mobility, which Congress found important to the economy.²²

States that did not have voluntary agreements adversely affected "highly skilled, highly motivated, and highly mobile workers" who worked for several employers in several states during the course of one year before losing employment.²³ Because base-wage periods²⁴ of the states varied so much, many unemployed mobile workers either did not receive unemployment benefits or received benefits that were much lower

16. Federal Unemployment Tax Act, ch. 23, 68A Stat. 439 (1954) (codified as amended at 26 U.S.C. §§ 3301-3311 (1994)).

17. 42 U.S.C. § 503(a).

18. Employment Security Amendments of 1970, Pub. L. No. 91-373, § 121, 84 Stat. 695, 701-02 (codified at 26 U.S.C. § 3304(a) (1994)); *see also* S. REP. NO. 752, 91st Cong., 2d Sess. 22-23 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3606, 3625-26.

19. S. REP. NO. 752, *supra* note 18, at 22, *reprinted in* 1970 U.S.C.C.A.N. at 3625.

20. *See id.*

21. *See id.* at 22, *reprinted in* 1970 U.S.C.C.A.N. at 3625-26.

22. *Id.*

23. *Id.* at 23, *reprinted in* 1970 U.S.C.C.A.N. at 3626.

24. Base-wage periods determine whether a worker has earned enough wages to receive unemployment benefits as well as the amount of benefits the worker is to receive. *See, e.g.*, KY. REV. STAT. ANN. § 341.090 (Michie 1995) (defining "base period" as "the first four (4) of the last five (5) completed calendar quarters immediately preceding the first day of a worker's benefit year"); *id.* § 341.350(5) (defining the qualifications that a claimant's base-period wage must meet). Each state may have a different base-wage requirement for a worker to be eligible to receive benefits in that state.

than what they should have received.²⁵ Many employees who worked in several states for the same employer before losing their jobs faced this same loss of benefits.²⁶

Congress amended the FUTA to correct these problems, so that states could not deny or reduce unemployment benefits solely because a worker filed a claim in another state or because the worker resided in another state at the time she filed the claim for benefits.²⁷ In addition, the FUTA now requires the states to participate in wage-combining agreements.²⁸ If the claimant worked in several different states, her wages from those states are now combined when determining monetary eligibility, using the base period of a single state.²⁹ For wage-combining purposes, the Senate Committee on Finance expected that the base period of the paying state would be used, although this was not delineated in the statute.³⁰

B. Regulations Implementing the FUTA in Interstate Claims

On December 28, 1971, the USDOL promulgated regulations on interstate arrangements for combining wages and on laws

25. S. REP. NO. 752, *supra* note 18, at 22–23, reprinted in 1970 U.S.C.C.A.N. at 3626.

26. *Id.* at 23, reprinted in 1970 U.S.C.C.A.N. at 3626.

27. See 26 U.S.C. § 3304(a)(9)(A).

28. *Id.* § 3304(a)(9)(B).

29. See *id.*

30. S. REP. NO. 752, *supra* note 18, at 23, reprinted in 1970 U.S.C.C.A.N. at 3626.

The FUTA interstate wage claim provision reads in full:

(9)(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;

(B) the State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the State law with his wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for

(i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and

(ii) avoiding duplicate use of wages and employment by reason of such combining.

26 U.S.C. § 3304(a)(9).

of application.³¹ The purpose of these regulations is to allow an unemployed worker with covered employment in more than one state to combine those wages in order to qualify for unemployment benefits or to receive more benefits in one state.³² The "states" include all fifty states of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands.³³ This means that the Secretary has the laws of fifty-three jurisdictions to consider. Standards prescribed by the Secretary apply to interstate claims filed under this arrangement.³⁴ Yet the states' unemployment agencies still must cooperate with each other.³⁵ The Secretary must resolve any disagreement about the operation of the arrangements, with the advice of designated state agency representatives.³⁶

Although the regulations define several terms, the most important for the purposes of this Article are the definitions of "paying state" and of "transferring state." If the claimant has been employed in several states, the state in which the unemployed worker files his claim for benefits becomes the paying state "if the claimant qualifies for unemployment benefits in that State on the basis of combined employment and wages."³⁷ If the claimant does not qualify under that criterion, the state where he was last employed must be the paying state.³⁸ Furthermore, if the claimant files a combined-wage claim for benefits in Canada, then the last state in which the claimant was employed is still the paying state.³⁹

A "transferring state" is a state in which a combined wage claimant had covered employment and wages during the base period of a paying state.⁴⁰ The transferring state would then

31. See 20 C.F.R. pt. 616 (1995). These regulations have been amended at least three times. See 45 Fed. Reg. 47,109 (July 11, 1980) (revising responsibilities of the paying state and clarifying benefit charges); 43 Fed. Reg. 2625 (Jan. 17, 1978) (altering rules to accommodate work in the Virgin Islands and to allow charges to the federal government for ex-civil servants and ex-military personnel); 39 Fed. Reg. 45,214 (Dec. 31, 1974) (revising definition of "paying state" to ensure increased benefit payments to claimants and to ease administration of combined-wage claims).

32. 20 C.F.R. § 616.1.

33. *Id.* § 616.1(a).

34. *Id.* § 616.4.

35. *Id.* § 616.3.

36. *Id.* § 616.4.

37. *Id.* § 616.6(e)(1).

38. *Id.* § 616.6(e)(2).

39. *Id.* Apparently, when § 616.6 was first promulgated, the Secretary of Labor still had not approved unemployment compensation laws for the Virgin Islands; the regulation has not been amended to indicate that approval has been granted. See *id.*

40. *Id.* § 616.6(f).

“transfer” this employment and corresponding wages to the paying state, which may determine the benefit rights of the claimant under the paying state’s law.⁴¹

A claimant with employment covered under the unemployment compensation laws of two or more states may choose to file a combined-wage claim for benefits.⁴² For example, suppose that a claimant worked six months in Michigan and eight months in Georgia. After becoming unemployed, he files for benefits in Kentucky. This claimant may file the combined-wage claim, regardless of whether or not he had sufficient covered employment under the laws of either Michigan or Georgia alone. The claimant might not be monetarily eligible in Kentucky unless the wages of Georgia and Michigan are combined.⁴³ In addition, this claimant may not file a combined-wage claim in Kentucky if he has unused benefit rights for that benefit year in another state.⁴⁴ For example, if the claimant had previously filed an unemployment compensation claim during the benefit year in Georgia and was again employed in that state before exhausting those benefits, he could not file a combined-wage claim in Kentucky after becoming unemployed.⁴⁵

Suppose this combined-wage claimant subsequently believes that he would receive more benefits by not filing the combined-wage claim. He may withdraw his claim under certain conditions.⁴⁶ First, the claimant must withdraw his claim within the time allowed to file an appeal, protest, or request for redetermination under the law of the paying state.⁴⁷ Second, the claimant must repay in full any benefits paid or authorize the state against whom he will file a substitute claim to repay the initial paying state out of benefits due under the substitute claim.⁴⁸

In processing the combined-wage claim, the paying state must request from all previous states a transfer of the claimant’s employment and wages accumulated during the paying state’s base period.⁴⁹ The paying state shall determine entitlement to

41. *Id.*

42. *Id.* § 616.7(a).

43. *See* KY. REV. STAT. ANN. §§ 341.090, 341.350(5) (Michie 1995) (delineating base period qualification).

44. *See* 20 C.F.R. § 616.7(a)(2).

45. *Id.* § 616.7(a).

46. *Id.* § 616.7(d).

47. *Id.*

48. *Id.*

49. *Id.* § 616.8(a).

benefits under its own law, even if the claimant had no earnings in that state.⁵⁰ The paying state shall give notice of determination on benefits.⁵¹ Appeals are determined in accordance with the laws of the paying state,⁵² except where the appeal involves a dispute as to coverage in the transferring state, in which case the transferring state will determine the appeal in accordance with its own law.⁵³

*C. State Law Inadequacies in Interstate Claims:
Kentucky Law as an Example*

Federal regulations fail to deal with several problems inherent in interstate claims—problems which are not remedied in state regulations either. This Article brings some of these problems to light in the following discussion of Kentucky law. Although Kentucky law is not necessarily the archetypal unemployment compensation law, problems in even one of the fifty-three jurisdictions participating in the Interstate Benefit Payment Plan⁵⁴ threaten the integrity of the entire system.

Kentucky complies with federal law in allowing the filing of interstate claims.⁵⁵ The Kentucky Administrative Regulations require the interstate claimant to be registered for work, as required by the laws and regulations of the agent state, i.e. the state where the claimant signs up for benefits.⁵⁶ By meeting the registration requirements of the agent state, the claimant will automatically meet the requirements of the liable state, i.e. the state where the claimant worked but not where he filed.⁵⁷ The agent state will inform the liable state whether or not the claimant meets the agent state's requirements.⁵⁸

An interstate claimant may file an interstate claim for benefits on uniform interstate claim forms and under uniform

50. *Id.*

51. *Id.* § 616.8(b).

52. *Id.* § 616.8(d)(1).

53. *Id.* § 616.8(d)(3).

54. See *supra* note 31; 26 U.S.C. § 3304(a)(9)(B).

55. KY. REV. STAT. ANN. § 341.145(3) (Michie 1995); 903 KY. ADMIN. REGS. 5:170 (1994).

56. 903 KY. ADMIN. REGS. 5:170, §§ 2(4), 3.

57. *Id.* §§ 2(5), 3(1).

58. *Id.* § 3(2).

procedures developed according to the Interstate Benefit Payment Plan.⁵⁹ The claim shall be filed at the appropriate local employment office of the agent state, at an itinerant point, or by mail.⁶⁰ The agent state shall “ascertain and report to the liable state” those facts that relate to the “claimant’s availability for work and eligibility for benefits.”⁶¹ The agent state’s responsibility is limited to reporting and investigating relevant facts.⁶²

With regard to appeals, “[t]he agent state shall afford all reasonable cooperation in taking of evidence and the holding of hearings.”⁶³ In determining whether an appeal is timely filed, an appeal will be considered made and communicated to the liable state on the date on which it is received by any qualified officer of the agent state.⁶⁴

These regulations leave noticeable omissions. For example, Kentucky law does not require a hearing officer in the agent state to make findings of fact regarding a claimant’s availability for work and monetary eligibility for benefits; nor does Kentucky law require a hearing officer to make findings on whether an appeal was timely filed. While the liable state’s law controls on most issues, the agent state’s law controls on registration for work requirements—yet Kentucky law does not define the agent state’s role with clarity.⁶⁵ Without federal regulations for reference, all parties—the claimant, the employer, and the states—have no guidance for resolving conflicts of laws, contested facts arising in the agent state, or other issues discussed in this Article.

II. INTERSTATE FINDINGS OF FACT

A. Case Example Involving Combined-Wage Claims

Even though the federal regulations clearly state that the paying state’s law controls⁶⁶ in a combined-wage claim, the

59. *Id.* § 5(1).

60. *Id.* § 5(3).

61. *Id.* § 6(1).

62. *Id.* § 6(2).

63. *Id.* § 7(1).

64. *Id.* § 7(2).

65. *Id.* §§ 3, 6, 7.

66. 20 C.F.R. § 616.8(a) (1995).

following case resulted differently, causing confusion over whether the paying state's or transferring state's law controls. Therefore, the USDOL or Congress should clarify the law governing interstate claims.

Benjamin Rose Institute v. District Unemployment Compensation Board (Benjamin Rose I) involved Valdon Walker, Jr., who entered the Army in 1971 and, upon completing his military duty, began working for the Benjamin Rose Institute in Cleveland, Ohio, in January 1973.⁶⁷ In June 1973, Walker voluntarily left work to attend graduate school; but in February 1974, he left school and applied for unemployment compensation in Washington, D.C.⁶⁸ Initially, the District Unemployment Compensation Board (DUCB) determined that Walker was eligible for twenty-two dollars per week, based solely on his military service.⁶⁹ But Walker also filed a combined-wage claim for increased unemployment benefits. After combining his military wages and employment with his Ohio wages and employment, the DUCB increased Walker's unemployment benefits from twenty-two dollars per week to eighty dollars per week.⁷⁰

Two hearings were held on the Institute's appeal—one in Ohio and one in Washington, D.C.⁷¹ At the Ohio hearing, the employer's representative testified that, under Ohio law, Walker was disqualified from receiving benefits because he voluntarily quit work without good cause.⁷² After this hearing, the referee forwarded the hearing transcript to the DUCB.⁷³

The DUCB conducted its own hearing, at which the Institute's attorney and Walker were present.⁷⁴ The examiner ruled that the correct procedure for determining Walker's benefits was to apply District of Columbia law both to his military service and to his Ohio employment. So under District of Columbia law, the examiner determined that Walker had good cause to leave his Ohio employment.⁷⁵ Because the employer hired Walker knowing that he intended to work only until he returned to school, the examiner reasoned that

67. 338 A.2d 104, 104 (D.C. 1975).

68. *Id.*

69. *Id.* Walker's unemployment benefits as a former servicemember were based on 5 U.S.C. §§ 8501(1)(B), 8502 (1970). *Id.* at 106.

70. *Id.*

71. *Id.* at 105.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

Walker had good cause to quit and was not disqualified from receiving benefits.⁷⁶

The Institute argued to the District of Columbia Court of Appeals that the law of Ohio rather than the law of the District of Columbia should apply.⁷⁷ The Institute conceded that Walker qualified for benefits in the District of Columbia solely based on his military employment. However, the Institute also argued that Walker's military wages were simply assigned to the District of Columbia rather than earned there.⁷⁸ If the military wages were "assigned," the District of Columbia apparently had no right to apply its own law in this combined-wage claim.

Although the court of appeals concluded that Ohio law should control, it reached its decision under a different theory.⁷⁹ The District of Columbia, by regulation, "entered into an agreement with the Secretary of Labor to pay unemployment compensation to exservicemen (UCX)."⁸⁰ Under this regulation, military service and wages are considered under the unemployment compensation law of the state to which they are assigned.⁸¹ Accordingly, military service was considered as employment within the District of Columbia under the interstate arrangement.⁸²

The DUCB argued that the District of Columbia's law controlled and that the DUCB should interpret Ohio law in that process.⁸³ Federal regulation provides that the District of Columbia, as the paying state, shall apply its own law, even if the combined-wage claimant has no covered earnings in that state.⁸⁴ The court concluded that this proposition controls only "if there is a disparity between the state base periods upon which benefits are to be determined";⁸⁵ the court gave no reason for this conclusion, except to say that the federal regulations control. This regulation would not control, however, where there is a dispute about the amount of employment and wages subject to transfer by the transferring state, i.e. Ohio.⁸⁶ Rather, when

76. *Id.*

77. *Id.* at 105–06.

78. *Id.* at 106 (relying on 5 U.S.C. § 8522 (1970)).

79. *Id.* at 106–07.

80. *Id.* at 106.

81. *Id.* at 107 (relying on 20 C.F.R. § 614.13 (1970)).

82. *Id.*

83. *Id.*

84. *Id.* (citing 20 C.F.R. § 616.8 (1974)).

85. *Id.* (citing 20 C.F.R. § 616.8(d)(3), which covers appeals).

86. *Id.*

an appeal involves a dispute as to the coverage of the employing unit or services in a transferring state, the appeal would be decided by the transferring state under its own law.⁸⁷ Under the court's interpretation, Ohio, as the transferring state, would determine whether the claimant's Ohio employment was subject to transfer to the District of Columbia.⁸⁸ The case was remanded to the DUCB for further proceedings.⁸⁹

On remand, the Ohio Bureau of Employment Services responded to the DUCB's request for information as follows: (1) Walker's wages had been correctly transferred to the District of Columbia, (2) the Institute had no right under Ohio law to object to or appeal from the transfer of wages, and (3) Walker's eligibility for combined wages was to be determined under District of Columbia law.⁹⁰ After another hearing, the DUCB again allowed the claimant to receive unemployment compensation, again holding that under District of Columbia law the claimant's reason for leaving employment was not disqualifying.⁹¹

On appeal, the District of Columbia Court of Appeals noted that, under Ohio law, Walker's reasons for leaving his employment would not be considered good cause and would disqualify him from receiving unemployment benefits in Ohio.⁹² Because the court had previously held that Ohio law controlled on this point, it reversed the second DUCB decision and denied benefits on Walker's combined-wage claim.⁹³

These decisions show that the USDOL needs to clarify the possible conflict between 20 C.F.R. § 616.8(a)⁹⁴ and § 616.8(d)(3),⁹⁵ neither of which has changed significantly since the two decisions in *Benjamin Rose Institute*.⁹⁶ After all, § 616.8(a) provides that the paying state's law controls, even if the combined-wage claimant has no earnings in that state.⁹⁷ On the other hand,

87. *Id.*

88. *Id.*

89. *Id.*

90. *Benjamin Rose Inst. v. District Unemployment Compensation Bd.*, 355 A.2d 569, 570 (D.C.), *cert. denied*, 429 U.S. 835 (1976).

91. *Id.*

92. *Id.*

93. *Id.*

94. The DUCB had relied on this rule to argue that District of Columbia law controlled. *Benjamin Rose I*, 338 A.2d at 107.

95. The court used this rule to determine that Ohio law controlled. *Id.*

96. Compare *id.* with 20 C.F.R. §§ 616.8(a), 616.8(d)(3) (1995).

97. 20 C.F.R. § 616.8(a). "The paying State shall apply all the provisions of its law to each determination made hereunder, even if the Combined-Wage Claimant has no earnings in covered employment in that State" *Id.*

§ 616.8(d)(3) provides that the transferring state's law controls in limited circumstances, such as in protests or appeals regarding coverage of the employing unit.⁹⁸ Yet, the only exception to the proposition that a paying state's law controls in § 616.8(a) is when the transferring state has adjudicated an issue prior to transferring the claim; in such a case, a paying state may not redetermine an issue.⁹⁹ However, this exception does not apply if the transferring state's determination made possible a combined-wage claim where the claimant's rights to benefits have been postponed.¹⁰⁰ Therefore, it appears that under § 616.8(a) the paying state's law should control in almost every case.

B. Interstate Cases Involving No Combined Wages

Up to this point, this Article has examined what happens when the claimant has worked in several states and files a combined-wage claim. This Article will now consider issues that arise when a claimant has worked in only one state but later files a claim for benefits in another state.

Unlike in combined-wage claims, federal regulations do not apply to most interstate claims filed. In most interstate cases, the claimant has worked in one state, became unemployed, and then files a claim for benefits in another state.¹⁰¹ As noted earlier, the FUTA prohibits states from denying benefits solely because the claimant files an interstate claim.¹⁰²

The principle of prohibiting the denial of benefits when the sole objection is that the claim is an interstate claim was interpreted in *Barr v. United States*.¹⁰³ In that case, Dorothy Davis Barr sued the United States Secretary of Labor, the Employment Security Commission of New Mexico, and the Industrial Commissioner of the New York State Department of Labor.¹⁰⁴ Barr had terminated employment in New York and then filed an interstate claim for unemployment benefits in

98. *Id.* § 616.8(d)(3).

99. *Id.* § 616.8(a).

100. *Id.*

101. *Cf. supra* text accompanying note 1.

102. 26 U.S.C. § 3304(a)(9)(A) (1994).

103. 478 F.2d 1152 (10th Cir.), *cert. denied*, 414 U.S. 910 (1973).

104. *Id.* at 1154.

New Mexico. She argued that she was entitled to have her employer's witnesses subpoenaed from New York to New Mexico where they could be subject to cross-examination, because otherwise she would be denied a fair hearing and wrongly denied benefits solely because she filed an interstate claim.¹⁰⁵ Additionally, she contended that the procedures of both states, which did not provide for out-of-state witness subpoenas, violated her constitutional due process rights and her right to a fair hearing under the federal statute.¹⁰⁶ The district court dismissed her complaint for failure to state a claim.¹⁰⁷

The United States Court of Appeals for the Tenth Circuit upheld the dismissal on several grounds.¹⁰⁸ Its most significant conclusion was that federal law does not require New Mexico to subpoena witnesses from New York before an interstate claim may be decided.¹⁰⁹ Rather, the court held that federal law only requires that a claimant be permitted to give testimony in her current state of residence and transmit the testimony to the liable state.¹¹⁰

In *Simmons v. District Unemployment Compensation Board*, the District of Columbia Court of Appeals determined whether demeanor evidence might be important in a hearing of an interstate claim where all of the claimant's employment was in another state.¹¹¹ Raymond Simmons worked in Gainesville, Florida, as a lumber warehouseman and was discharged for allegedly reporting to work under the influence of alcohol. Subsequently, Simmons filed a claim for unemployment compensation in the District of Columbia. When the District Unemployment Compensation Board's (DUCB) Claims Deputy ruled that Simmons was disqualified for misconduct, Simmons filed an appeal and requested a hearing.¹¹² An evidentiary hearing was conducted before a Florida appeals referee, and the employer and the claimant presented conflicting evidence. The Florida appeals referee merely recorded the testimony, making no

105. *Id.*

106. *Id.*

107. *Id.* at 1154-55.

108. *Id.* at 1155-56.

109. *Id.* at 1156.

110. *Id.*

111. 292 A.2d 797, 799 (D.C. 1972).

112. *Id.*

findings of fact or conclusions about the conflicting testimony.¹¹³

The DUCB Examiner listened to a recording of this testimony and concluded that the claimant had been drinking on the job and was disqualified because of work-related misconduct.¹¹⁴ The DUCB never saw the claimant or his supervisor, so it had no opportunity to observe the demeanor of either party, while the Florida referee, who had the opportunity to observe the demeanor of both, made no credibility findings.¹¹⁵ The District of Columbia Court of Appeals concluded that this method of review was inappropriate where the trier of fact was unable to observe the demeanor of the witnesses in making a decision about the witnesses' credibility and where credibility is a significant issue in deciding a claim.¹¹⁶ Therefore, the court reversed the decision and granted the benefits claim.¹¹⁷

As the court in *Simmons* concluded, the ability of the finder of fact to observe the demeanor of both parties is significant. When a board reviews decisions where the parties testified in person, it is likely that the reviewing board will defer to the referees' observations of demeanor. Therefore, it is important in interstate claims that the fact finder make such findings before the case is transmitted to the liable state which will make conclusions of law.

In *Dowd v. Director of the Division of Employment Security*,¹¹⁸ the Supreme Judicial Court of Massachusetts addressed the similar issue of which state should resolve conflicting testimony where the liable state delegates fact finding to the agent state. The claimant, James Dowd, had worked in Massachusetts, where he filed a claim for unemployment benefits. On July 31, 1981, a claims director in the Division of Employment Security (DES) office in Massachusetts gave Dowd notice that he was disqualified from receiving unemployment compensation.¹¹⁹ At that time, Dowd told the claims director that he would be moving to Pennsylvania and was concerned about Massachusetts' ten-day deadline for filing an appeal. The claims director assured Dowd that he could file his appeal in Pennsylvania and

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 459 N.E.2d 471 (Mass. 1984).

119. *Id.* at 472.

that the Massachusetts office would forward his records. On August 4 and 13, 1981, Dowd reported to the unemployment security office in Pennsylvania, where he did not file his appeal until August 17, 1981.¹²⁰

A hearing was held in Pennsylvania to determine whether the claimant had good cause for failing to appeal in ten days.¹²¹ Both Dowd and a representative of the Pennsylvania employment security office appeared at the hearing.¹²² A DES examiner in Massachusetts reviewed this Pennsylvania testimony as well as the exhibits and concluded that Dowd did not have good cause to file a late appeal.¹²³ Accordingly, DES denied his claim for unemployment benefits.¹²⁴

Before the Supreme Judicial Court of Massachusetts, Dowd argued that neither the review examiner nor the DES board of review made findings of fact on the crucial issue of what had happened at the Pennsylvania office on August 4.¹²⁵ He contended that he was told that he could not appeal until his records arrived from Massachusetts. The court concluded that the procedure followed in this case was defective and that the review examiner erred.¹²⁶

The court recognized that a worker who loses his job in the liable state may collect unemployment benefits even though he resides in the agent state.¹²⁷ As required by federal law, both Massachusetts and Pennsylvania participated in the Interstate Benefit Payment Plan.¹²⁸ Under Massachusetts' procedural rules, the agent state, Pennsylvania, was responsible for investigating and reporting relevant facts.¹²⁹

In this case, the hearing officer in Pennsylvania should have made significant factual and credibility determinations, including whether the claimant was really told that he would have to wait until his records arrived from Massachusetts and whether standard procedure was followed.¹³⁰ While the examiner for the

120. *Id.*

121. *Id.*

122. *Id.* The representative had never met with Dowd on his earlier visits to the office. *Id.*

123. *Id.* Massachusetts law would have extended his time to appeal from 10 days to 30 days for good cause. *Id.* at 472 n.3.

124. *Id.* at 472.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 473.

130. *See id.*

agent state could not determine the issue of law of whether Dowd had good cause for a late appeal, that examiner should have resolved the conflicts in testimony at the evidentiary hearing.¹³¹ Accordingly, the Supreme Judicial Court of Massachusetts remanded the case so that Pennsylvania, as the agent state, could resolve the conflicting testimony.¹³²

Whereas federal regulations provide procedural requirements in resolving combined-wage claims, federal law leaves an interpretative gap for all other interstate claims. These cases provide some guidance for determining the responsibilities of the agent state and the liable state when wages are not combined, but perhaps federal law should govern these types of cases as well.

III. DUE PROCESS PROTECTIONS

Federal unemployment compensation law requires states to provide an opportunity for a fair hearing if unemployment compensation benefits are denied.¹³³ Due process rights in administrative hearings commonly include: (1) notice of the issues; (2) the right to present evidence and argument; (3) the right to cross-examine so as to rebut adverse evidence; (4) the right to appear with counsel; (5) the right to have a decision based only on the evidence of record at the hearing; and (6) the right to have a complete record of the testimony, evidence, and exhibits.¹³⁴

A. Attorney Representation in Interstate Claims

Without an attorney to secure these rights, however, due process is all but unattainable. In *Simmons v. Traugher*, the Tennessee Supreme Court discussed the right to appear with an attorney in *intrastate* unemployment compensation claims.¹³⁵ In

131. *Id.*

132. *See id.* at 473–74.

133. 42 U.S.C. § 503(a)(3) (1994).

134. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 203–04 (2d ed. 1984).

135. 791 S.W.2d 21, 22–26 (Tenn. 1990). Although this is an intrastate case, its ruling should apply with even greater force in interstate cases.

1987, Cornelia Simmons was discharged, allegedly for poor work performance and absenteeism.¹³⁶ She appealed an initial denial of unemployment benefits, and the notice of her appeal advised her of her right to be represented by counsel at her own expense.¹³⁷ The employer appeared at the Appeals Tribunal hearing with counsel and with witnesses, while Simmons appeared without counsel and without witnesses.¹³⁸ The referee informed Simmons that she had the right to cross-examine and testify on her own behalf but did not mention her right to representation.¹³⁹ Simmons did not learn of the Legal Services office in Columbia, Tennessee, until after this hearing. Her request for rehearing on the grounds of a lack of counsel was denied.¹⁴⁰

The Tennessee Supreme Court declined to reach the constitutional issues and instead interpreted the statutory requirements of a fair hearing.¹⁴¹ The court noted that the right to be heard includes the right to be represented by counsel, and that, for the right to counsel to be meaningful, claimants must know that the right exists.¹⁴² The court characterized the notice, which advised Simmons of the right to be represented by counsel at her own expense, as "negative and misleading," because for many unemployed claimants, such a notice would end their interest in obtaining an attorney.¹⁴³ Additionally, the court stated that Tennessee public policy would be furthered by notifying individuals unemployed through no fault of their own of the possible availability of free or low-cost legal counsel.¹⁴⁴ Accordingly, the court held that future notices in Tennessee must advise claimants that if they cannot afford legal counsel, free or low-cost counsel may be available.¹⁴⁵

As *Simmons* indicates, a notice that an attorney may be available at free or at low cost is an important element of due process to provide the claimant a fair hearing. This is equally true for interstate claimants. Yet, federal law does not require notice to interstate claimants as to how they may obtain free or low-cost legal counsel in the liable state. As a legal services

136. *Id.* at 23.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.*

141. *Id.* at 24.

142. *Id.*

143. *Id.*

144. *Id.* at 25.

145. *Id.* at 25-26.

lawyer in Kentucky, I have had difficulty assisting interstate claimants in obtaining free or low-cost representation in the liable state. Even assuming the liable state allows the claimant to be represented by a person not licensed to practice law in that state, I would be very hesitant to attempt to represent a claimant in a different liable state, even through a telephonic hearing. The law library in my area of Kentucky only contains four states' statutes and does not include their administrative regulations. Without the ability to be competent in the laws of fifty-two other jurisdictions, I would probably violate the Kentucky Supreme Court's Rules of Professional Conduct¹⁴⁶ were I to represent interstate claimants where Kentucky is not the liable state. A notice of hearing, therefore, must describe how to obtain free or low-cost legal representation in the state whose laws will apply.

B. Subpoenas for Witnesses in Interstate Hearings

The failure to provide a method of witness subpoenas in an interstate hearing can also constitute a denial of due process.¹⁴⁷ In a Louisiana case, the claimants worked ten to twelve hours per day, five days per week as truck drivers hauling rice.¹⁴⁸ On June 24, 1982, they reported for work in Louisiana and were told to pick up a load of rice from Mississippi. When they arrived in Mississippi, no one was available to load the trucks.¹⁴⁹ Their employer instructed them to wait overnight in Mississippi.¹⁵⁰ Because they were not paid by the hour, they refused to stay overnight, and the employer discharged them.¹⁵¹

The claimants had two coworkers who could have testified to the incident that led to their discharges, and one was still working with the employer.¹⁵² After initial denials of benefits, the claimants received a notice of a telephonic hearing on their appeal.¹⁵³ The notice instructed that their witnesses had to be

146. KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

147. See *supra* text accompanying note 134.

148. *Schexnider v. Blache*, 506 So. 2d 864, 864 (La. 1987).

149. *Id.*

150. *Id.*

151. *Id.* at 865.

152. *Id.*

153. *Id.*

available to testify at the claimants' telephones but did not instruct how to subpoena witnesses.¹⁵⁴

The Louisiana Supreme Court stated that the right of a claimant to present rebuttal evidence is important in a fair hearing.¹⁵⁵ Because the claimants were not told how to subpoena essential witnesses, the court remanded the case so that the referee might allow the claimants either to have the witnesses subpoenaed for a telephonic hearing or to have the witnesses give their depositions.¹⁵⁶

Similarly, an interstate claimant who testifies in person or through a telephonic hearing must be allowed to subpoena necessary witnesses or documents in order to have a fair hearing. The question is how a claimant might apply a subpoena across jurisdictions. For example, how does a claimant who worked in Florida subpoena a necessary witness who lives in Georgia after she files an interstate claim in Michigan? Federal standards are needed so that claimants will be able to subpoena necessary witnesses and documents in all states.

C. Interstate Claimant's Right to Judicial Review

Whether an unemployment compensation claimant is entitled to judicial review depends on which state's law controls. A claimant is entitled to have a fair hearing when her right to unemployment compensation is denied.¹⁵⁷ Intrastate claimants and employers expect the right to judicial review if they receive an unfavorable decision at the administrative level.¹⁵⁸

Consider this hypothetical situation of an interstate claimant: A combined-wage claimant, who worked in Georgia and Alabama, files an interstate claim for unemployment compensation in Kentucky. The claimant has not worked in Kentucky, but Kentucky law applies.¹⁵⁹ Suppose that the claimant has administrative hearings that result in a decision for the employer. After exhausting administrative appeals, the claimant may seek

154. *Id.*

155. *Id.* at 865-66.

156. *Id.* at 867.

157. 42 U.S.C. § 503(a)(3) (1994).

158. In Kentucky, for example, KY. REV. STAT. ANN. § 341.450 (Michie 1995) confers this right as a statutory matter.

159. 20 C.F.R. § 616.8(a) (1995).

judicial review in Kentucky. To seek judicial review there, the claimant must file a verified complaint against the Kentucky Unemployment Insurance Commission and the employer in the circuit court of the county *in which she was last employed* within twenty days after the Commission's decision.¹⁶⁰ The Kentucky Supreme Court has stated, however, that "[t]here is no appeal to the courts from an action of an administrative agency as a matter of right."¹⁶¹ When a statute specifies how the appeal is to be commenced, the appellant must follow strict compliance with the statute; otherwise, the circuit court lacks jurisdiction to review the case.¹⁶² Thus, for example, a claimant's failure to name the employer in the complaint is fatal to the claim, even when the employer has notice of all proceedings.¹⁶³ Moreover, where a claimant in Kentucky fails to follow the statutory requirement of having the complaint verified, the Kentucky Court of Appeals has held on several occasions that the court also lacks jurisdiction to consider the merits of the appeal.¹⁶⁴

In our hypothetical case, therefore, a combined-wage claimant who has never worked in Kentucky, the paying state, most likely has no right to seek judicial review if Kentucky judicial review is strictly construed, because she cannot file in the county of last employ. Or, if Kentucky law also applies to an interstate claimant's job registration requirements, the claimant would have no right to seek judicial review under Kentucky law because, again, the claimant must file the appeal in the Kentucky county in which she was last employed. Because she was never employed in Kentucky, she cannot request judicial review. Judicial review is not explicitly required by federal law under the right to a fair hearing, and these plausible hypotheticals show that Kentucky law would in effect deny an interstate claimant the right to judicial review. Federal law could assure that states allow judicial review for interstate claimants.

160. KY. REV. STAT. ANN. § 341.450.

161. Kentucky Unemployment Ins. Comm'n v. Carter, 689 S.W.2d 360, 362 (Ky. 1985) (emphasis omitted).

162. *Id.*

163. *Id.* at 361, 363.

164. *E.g.*, Fisher v. Kentucky Unemployment Ins. Comm'n, 880 S.W.2d 891, 892 (Ky. Ct. App. 1994); Monahan v. Kentucky Unemployment Ins. Comm'n, 709 S.W.2d 837, 837 (Ky. Ct. App. 1986); Pickhart v. United States Post Office, 664 S.W.2d 939, 940 (Ky. Ct. App. 1983).

IV. COMPARISON BETWEEN CHOICE-OF-LAW RULES FOR UNEMPLOYED FEDERAL WORKERS AND INTERSTATE CLAIMANTS

Federal provisions regulate unemployment compensation claims for both federal civilians (UCFE) and former military servicemembers (UCX).¹⁶⁵ Because of the need for federal-state coordination, federal regulations dictate which state's law applies, depending on where and when the federal civilian or servicemember was employed.¹⁶⁶ The regulations specify which state's law will apply to the various issues of unemployment compensation, including claims filings, notices of determination, ability and availability for work, and disqualifications.¹⁶⁷ For interstate UCFE and UCX claims, the claimant is referred to the regulations on combined-wage claimants and to the Interstate Benefit Payment Plan.¹⁶⁸

Federal employees, therefore, are obviously affected by state laws regarding interstate claims. The importance of mentioning this in passing is that the regulations on choice of law for the UCFE and UCX programs appear in many ways to be clearer than those for interstate claimants, whereas no federal regulations pertain to choice-of-law rules for most other interstate claimants. Only one regulation covers claimants who have worked in several states for purposes of combined-wage claims for benefits.¹⁶⁹ As noted earlier, at least one court has interpreted this regulation; however, the intended result can also be ambiguous.¹⁷⁰

V. SUMMARY AND SUGGESTED REFORMS

Federal regulations govern claimants with combined wages in interstate claims but do not otherwise cover interstate

165. 5 U.S.C. § 8501 (1994). The unemployed federal civilian program is referred to as UCFE (Unemployment Compensation for Federal Employees). 20 C.F.R. § 609.1(a) (1995). The unemployed former servicemember program is referred to as UCX (Unemployment Compensation for Ex-servicemembers). *Id.* § 614.1(a).

166. 20 C.F.R. §§ 609.8(a), 614.8(a) (1995).

167. *Id.* §§ 609.9, 614.9.

168. *See id.* §§ 609.9(b), 609.9(c), 614.9(b), 614.9(c).

169. *See id.* pt. 616.

170. *See supra* Part II.

claimants. Uniform regulations on which state's law is to apply to all interstate claims would address many of the problems highlighted in this Article. Both the UCFE and UCX programs give clearer ideas on how to promulgate regulations determining which state's laws will apply to an interstate claim. Moreover, the case law discussing agent state and liable state responsibilities could be codified in order to clarify the responsibilities of each state. Although combined-wage regulations provide some guidance, the regulations still need clarification as to when the law of the transferring state controls and when the law of the paying state controls.

Finally, a fair hearing in unemployment compensation implies the right to notice, the right to present evidence, the right to cross-examine, the right to counsel, the right to a decision based on the evidence, and the right to have a complete record made.¹⁷¹ This means that an interstate claimant must have notice of how to obtain free or low-cost legal counsel from the liable state, that telephonic hearings need clear standards,¹⁷² that a claimant should have the means to subpoena necessary witnesses and documents to the administrative hearing, and that the interstate claimant should have the right to seek judicial review.

Our mobile society ensures that some individuals will seek work in more than one state. When a worker loses a job and needs to file for benefits in another state, unemployment compensation becomes more complex. Complexity might provoke stimulating intellectual debate, but it wreaks havoc for the legal practitioner with limited resources. More regulations of uniform application from the USDOL or laws from Congress could address these problems.

171. See *supra* note 134 and accompanying text.

172. Telephone hearings are discussed in an accompanying article in this Symposium. See Allan A. Toubman et al., *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REF. 407 (1996).

